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THE ADMINISTRATIVE AGENCY IN HISTORICAL PERSPECTIVE†

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One concerned with administrative law appreciates the pertinency of North's famous statement about legal history which is reproduced on the title page of *Holdsworth*: "To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law."

The present crisis of the administrative process in this country makes it particularly appropriate that we look at the administrative agency in the perspective of history, for it is erroneous to assume that administrative law is something entirely new in our system. On the contrary, what we have been seeing in our own day has been a renaissance of administrative justice of the type which prevailed in the common-law world in Tudor and Stuart times. Then, too, the law proved not wholly adequate to meet the problems posed by changing economic and social conditions. As in our time, a number of executive tribunals were created to deal with the situation.

Before we can look to the lessons of history in this field, however, a word must be said about the current crisis in the administrative agencies. In March 1940, James M. Landis, then Dean of the Harvard Law School, delivered a noted public lecture on "Crucial Issues in Administrative Law."¹ In it, he dealt with what he considered the principal problems posed by the operation of administrative agencies and especially with those dealt with in the highly controversial Walter-Logan bill, then pending before the Congress. Today, some twenty years later, the federal agencies are again embroiled in public debate, this time as the result of congressional investigation. Throughout the country there has been articulated a growing concern over the manner in which those agencies

† Paper delivered at the New York Conference of the American Society for Legal History held at New York Law School October 24, 1960.

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1. 53 HARV. L. REV. 1077 (1940).

function. To understand such concern, we must look to the place of administrative justice in our system and the reasons behind its recent rebirth.

I. PLACE OF ADMINISTRATIVE JUSTICE

Despite the vast concern articulated in recent years over exercises of administrative authority, it is surprising that there have been practically no serious reconsiderations of the role of administrative justice as such. Investigations and efforts at reform have been concerned almost entirely with the procedural aspects of administrative law. Little, if any, real scholarly attention has been paid to the question of whether administrative justice in its present form is still actually appropriate under present-day circumstances. Practically all students of our administrative law agree that the growth of American administrative justice has been haphazard. That may be an inevitable concomitant of any newly developing system of social control, but there comes a time in such development when the early disorder must give way to a period of synthesis and systematization. The role of administrative justice should be re-examined in the light of the more than half a century of experience that the Federal Government has had with the modern administrative process. Such re-examination must focus upon the proper division of judicial authority as between courts and administrative agencies.

To the Anglo-American lawyer there is a basic difference between a court and an administrative agency. A court, to his way of thinking, is an organ "discharging judicial power with all the implications of the judicial function in our constitutional scheme."² An organ characterized as administrative stands on a different footing. As was aptly pointed out by an eminent English judge, a court is ill-fitted for the determination of the type of dispute which may be conferred upon an administrative body.

Certain types of questions are not so suitable for decision by courts of law as by a different type of tribunal. A court of law must necessarily be guided by precedent. Its functions are first to ascertain the facts and then to apply the law to the facts as ascertained. In applying the law it must be guided by previous decisions. If it does not do this the law becomes chaotic. The whole tradition and practice of legal administration makes it extremely difficult for the judges to administer a law by

2. See *Penfield Co. v. SEC*, 330 U.S. 585, 604 (1947) (Frankfurter, J., dissenting).

which the tribunal is to grant or withhold rights according as they think it just or reasonable to do so.³

The advantages of decision by administrative organs—directness, expedition, freedom from the bonds of purely technical rules, and the consequent ability to give effect to the legislatively expressed policy⁴—can only be bought at the cost of many of the traditional checks which obtain upon courts. Certainty and predictability, the technique of decision according to authoritative principles, and the bridling of the individual will of the magistrate by formalized rules of procedure—these must inevitably be lessened as freer play is given to administrative discretion.

The basic dissimilarity between judicial and administrative power in the common-law world was underlined by the well-known attempt by the British Committee on Ministers' Powers to distinguish between "judicial" and "administrative" decisions. A judicial decision was said by the Committee to presuppose an existing dispute between two or more parties and to involve four requisites: (1) the presentation of their case by the parties to the dispute; (2) the ascertainment of questions of fact by means of evidence adduced by the parties; (3) the submission of legal argument on questions of law; and (4) a decision that disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found.⁵

An administrative decision is something entirely different. Indeed, asserted the Committee, the very word "decision" has a different meaning in the one sphere of activity than in the other.

In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion.⁶

One of the most significant things about the system of administrative law that has developed in this country is that it has blurred the sharp distinction between judicial and administrative power that has heretofore been of such importance in our law. "The distinctive develop-

3. GREENE, *LAW AND PROGRESS* 20 (1944).

4. See Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 24 (1914).

5. COMMITTEE ON MINISTERS' POWERS, REPORT, CMD. PAPER 4060, at 73 (1932).

6. *Id.* at 81.

ment of our era," said Mr. Chief Justice Hughes in an oft-quoted passage,

is that the activities of the people are largely controlled by government bureaus in State and Nation. It has been well said that this multiplication of administrative bodies with large powers has raised anew for our law, after three centuries, the problem of 'executive justice'; perhaps better styled 'administrative justice.' A host of controversies as to private rights are no longer decided in courts.⁷

If we refer back to the distinction made by the Committee on Ministers' Powers between "judicial" and "administrative" decisions, there appears to be little doubt that many of the agencies referred to by Chief Justice Hughes are vested with the authority to render truly judicial decisions. From an analytical point of view, in fact, the powers of decision conferred upon many federal agencies could easily have been vested in the courts. Thus, a proceeding for a reparation order by a shipper against a carrier before the Interstate Commerce Commission cannot be distinguished logically from a suit for damages brought in a court. Nor can the cease and desist power of an agency like the Federal Trade Commission be differentiated in its legal effect from the injunctive authority traditionally exercised by courts of equity. In these, and a whole host of other cases, the administrative agency is vested with judicial power just as are the ordinary courts of justice.

II. REASONS FOR ADMINISTRATIVE JUSTICE

Once we concede, as we must, that administrative agencies are endowed with true judicial power, then we are confronted with the basic problem of the place of administrative justice in our legal system. As a starting point, it seems clear that the vesting of judicial power in agencies, rather than courts, does some violence to our basic conceptions. "That government officials . . . should themselves assume to perform the functions of a law court and determine the rights of individuals, as is the case under a system of administrative justice, has been traditionally felt to be inconsistent with the supremacy of law."⁸

Under the now-classic definition of A. V. Dicey, the doctrine of the supremacy of law means "that no man . . . can be lawfully made to suffer in body or goods except for a distinct breach of law established

7. N.Y. Times, Feb. 13, 1931, p. 18, col. 1.

8. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 33 (1927).

in the ordinary legal manner before the ordinary courts of the land."⁹
This principle

is overridden by a procedure under which a man may have his property destroyed by a health officer, or a railroad be ordered to decrease its rates by a utilities commission, or an employer be compelled to pay compensation to an injured employee by an industrial-accident board. For these bodies are not 'ordinary courts' in Dicey's sense. 'Judicial' as their functions clearly seem to be, they are not 'courts' in the common-law meaning of the term. And they differ from common-law courts in precisely the particulars which furnish the reasons for the common law's insistence that every individual shall be entitled to have his rights tried in a law court.¹⁰

If the conferring of judicial power on agencies other than the courts runs counter to Anglo-American traditions, why is it that such power has been vested in such agencies rather than in the courts? And, in some ways even more pertinent for the purposes of this paper, are the reasons which impelled the Congress to confer judicial authority upon administrative agencies instead of courts still valid?

Of the various reasons which have influenced the Congress to delegate to administrative agencies judicial power similar to that normally exercised by the courts, perhaps the most important have been the supposed inadequacies of the judicial process in dealing with regulatory problems. The courts were widely felt to be ineffective as instruments for the enforcement of many of the new legislative policies which have found expression in modern regulatory statutes. Thus, there is little doubt that one of the chief reasons for the creation of the Interstate Commerce Commission in 1887 was the inadequacy of existing common-law methods to deal with the abuses then prevalent in the railroad industry.

In part, the asserted inadequacies of the courts were seen to result from the inherent nature of the judicial process which prevented the courts from playing more than the role of impartial arbiters between conflicting parties, rather than that of both policeman and judge, as was felt to be necessary for effective implementation of the new regulatory schemes. Even more influential, however, has been the widespread feeling that the individualistic bent of the judges and the common-law system developed by them rendered the courts ill-fitted to carry out the

9. DICEY, *LAW OF THE CONSTITUTION* 188 (9th ed. 1939).

10. DICKINSON, *op. cit. supra* note 8, at 35.

new regulatory laws so as to give full effect to the legislative intent to bring important elements of the economic and social system under the fostering guardianship of the state. Judicial subservience to an obsolete body of rigid legal doctrine was said to result in a "traditional lack of sympathy [on the part of the judiciary] with the positive aims of modern government,"¹¹ and this, in turn, made it most undesirable for laws seeking to give effect to such aims to be left to the courts for implementation. This feeling has led the legislator, in many cases, to choose the administrative rather than the judicial machinery.

One of the great difficulties with the courts, according to the advocates of administrative justice, arises from the costly and cumbersome procedures employed by them. Judicial justice, they assert, is both expensive and time-consuming. The cost of going to law constitutes a strong deterrent to the average citizen with a grievance. Added to this is the great delay involved in litigation; judicial justice is dispensed ever so slowly, though it may be dispensed exceedingly well.

These difficulties, it has been claimed, are avoided by vesting judicial power in administrative agencies instead of courts. The administrative agency, composed of experts and able to devote its exclusive attention to its particular specialized field, could avoid the technicalities which are popularly associated with "the law's delays." "A cheap and speedy forum is intended to be made available through administrative agencies to those whose circumstances and immediate needs might be ill-served by extensive litigation of a traditional type."¹² The supposed ability of the agencies to avoid the expense and delay inherent in litigation in the courts has been a major consideration in inducing the legislator to select the administrative rather than the judicial forum since the beginning of our administrative law. Under the Interstate Commerce Act, asserted Mr. LaFollette during the Congressional debates, "every citizen of the United States is given the right to present his grievance and have his case tried without the attendant cost which now practically closes the courts to him."¹³

III. CURRENT VALIDITY OF REASONS FOR ADMINISTRATIVE JUSTICE

Judicial Inadequacy. It is no longer accurate, in this country at least, to speak of the courts as hostile to effective implementation of regulatory laws. Such hostility there may well have been half a century

11. COMMITTEE ON MINISTERS' POWERS, MINUTES OF EVIDENCE at 52 (1932) (Testimony of W. A. Robson).

12. GELLHORN AND BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 7 (4th ed. 1960).

13. Quoted in CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 48 (1941).

ago; but today, if anything, the judicial pendulum, especially in the federal courts, appears to have swung to the other extreme. To presuppose an inherent "judicial lag" in cases involving changing social and economic conditions is to betray a basic ignorance of the method of judicial empiricism developed over the centuries in the common-law world.

It is a mistake to assume that law must inevitably lag behind the other social sciences. The opposition between law and government, the subordination of administration to law, which may have hindered American legislative experiments during the past century are not inherent in judicial justice. Mr. Justice Cardozo, in an analysis of decisions such as *Ives v. South Buffalo Ry.*¹⁴ and *Adkins v. Children's Hospital*,¹⁵ has shown that the results reached were due to the judicial choice of certain starting points.¹⁶ Not an inveterate antipathy between law and government, but the influence of the nineteenth-century individualist ethic upon which the thinking of these judges was based was responsible for which starting point was chosen. Judicial justice is not always too slow in responding to changes in the environment in which it operates. Nor is the growing point of law invariably in legislation. Most fundamental changes in our legal system have, indeed, been the work of our courts. "The infusion of morals into the law through the development of equity was not an achievement of legislation, it was the work of courts. The absorption of the usages of merchants into the law was not brought about by statutes but by judicial decisions."¹⁷

The development of an American common law—the creation of a body of judicially declared principles suitable to America out of the old English cases and statutes¹⁸—was almost wholly of judicial handiwork. Where was the claimed "judicial lag" when the vision of John Marshall was helping to mold a confederation of separate states into a united nation, or when the English courts, under the leadership of Lord Mansfield, were fusing the principles of common law, equity, and law merchant into a modern legal system?

The backwardness of some of our courts with respect to social problems during the past century, which some assert to be inherent in judicial justice, was thus only a temporary phase based upon the persistence in the judicial mind of a temporary individualist philosophy. The remedy for this deficiency is not to withdraw the problems growing out of present-day government from the sphere of the judicial process.

14. 201 N.Y. 271, 94 N.E. 431 (1911).

15. 261 U.S. 525 (1923).

16. CARDOZO, *THE GROWTH OF THE LAW* 71-74 (1924).

17. POUND, *THE SPIRIT OF THE COMMON LAW* 184 (1921).

18. See Pound, *Justice According to Law*, 14 COLUM. L. REV. 103, 113 (1914).

The infusion into the judicial philosophy of modern social and economic ideas is already furnishing new premises to enable our courts to deal constructively with the issues arising from the changing role of the state.

When once the current of juristic thought and judicial decision is turned into the new course our Anglo-American method of judicial empiricism has always proved adequate. Given new premises, our common law has the means of developing them to meet the exigencies of justice and of molding the results into a scientific system.¹⁹

Cost and Delay. Over half a century's experience with the administrative process in operation has proven the claim of its proponents that it would realize the basic goal of every legal system—that of dispensing speedy and inexpensive justice—to be more or less a will-o'-the-wisp. Every study that has been made of the actual working of the federal regulatory agencies has complained of the cumbersome and overtechnical nature of administrative justice. Thus, according to the Attorney General's Committee on Administrative Procedure, "the administrative agencies have frequently failed to provide a speedy forum, unhampered by burdensome delays. Lengthy hearings and incredibly voluminous records, sometimes running into tens of thousands of pages, have been phenomena not rare in the administrative process."²⁰ And, in 1949, the first Hoover Commission noted its concern "with the growth of cumbersome and costly administrative procedures." "Administrative justice today," asserted the Commission, "unfortunately is not characterized by economy, simplicity, and dispatch."²¹

Nor has the situation improved since the time when the first Hoover Commission reported. On April 29, 1953, the President called a Conference on Administrative Procedure to consider "unnecessary delay, expense and volume of records" in administrative proceedings. The Conference itself, in its very first recommendation to the agencies—which it termed "the underlying philosophical declaration by the Conference"—called for the elimination of unnecessary delay and expense in agency proceedings,²² and the Second Hoover Commission Report speaks in a similar vein.²³

19. POUND, *op. cit. supra* note 17, at 184-85.

20. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, REPORT at 61 (1941).

21. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON THE INDEPENDENT REGULATORY COMMISSIONS at 10, 11 (1949).

22. PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT at 66, 13 (1955).

23. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE at 63-64 (1955).

That the administrative process has not, in fact, provided the cheap and speedy justice which was one of the principal factors motivating the Congress to vest judicial authority upon agencies instead of courts seems but too obvious. According to the Second Hoover Commission Report, there are all too many examples of unreasonable delay in the federal administrative process.

Cases before the Bureau of Motor Carriers of the Interstate Commerce Commission are reported as averaging about 21 months. The Commission's Bureau of Finance reports proceedings lasting 1 year. The National Labor Relations Board, on the average, requires 1 year for the disposition of unfair labor practice cases and 6 months for representation cases. Proceedings before the Bureau of Old Age and Survivors Insurance of the Department of Health, Education, and Welfare and before the Veterans' Education Appeals Board average 4 months and 1 year, respectively. The Subversive Activities Control Board reports 2 years as the average time for an adjudicatory proceeding before that agency. One of the worst examples of delay . . . occurs in the Indian Claim Commission, where in five case dockets (Nos. 327, 328, 332, 196, and 330) petitions have been filed and proceedings have been pending since at least August 10, 1951, without any answer by the Government more than 3 years later.²⁴

These examples are purely factual and can hardly be disputed by even the most inveterate critic of the report, and those familiar with the situation know that similar examples can be found in the work of many other federal agencies. It is unrealistic today to contrast cheap and expeditious administrative justice with the costly and cumbersome justice dispensed by the courts. If anything, the shoe is now on the other foot.

So marked, indeed, has this become that the Securities and Exchange Commission has recently found it desirable in one branch of its work to resort to the Federal courts for the trial of its cases and the invocation of the sanctions provided by statute; utilization of the administrative hearing has been found to be slower and more expensive, and, according to this agency's experience, far less in the way of proof and record are necessary to obtain relief in the courts than before the agency itself. While peculiarities of subject matter and surrounding circum-

24. *Ibid.*

stance limit the significance of this instance, it is nevertheless suggestive of shortcomings in the administrative process.²⁵

Administrative justice in slow motion is a most shocking thing, especially if one bears in mind that the administrative decision is not the last word upon the matter. The decision of the agency rendered years after the filing of the complaint must then run the gantlet of judicial review which may itself take years, involving, as it may, recourse to two and even three courts before the matter is finally resolved. Justice rendered under those conditions may and often does prove illusory; a system in which *Jarndyce v. Jarndyce* may become the normal type of decision stands in need of drastic overhauling.

IV. CONCENTRATION OF POWERS

If the doctrine of the separation of powers were a "doctrinaire concept to be made use of with pedantic rigor,"²⁶ the rise of the modern administrative agency would have been an impossibility in our law, for the outstanding characteristic of such agency is the possession by it of powers which are both legislative and judicial in nature. The important federal commissions are vested, on the one hand, with the authority to promulgate rules and regulations having the force of law and, on the other, with the power to render decisions adversely affecting the person or property of particular individuals. The powers so vested in these agencies are comparable to those traditionally exercised by the Congress and the courts. They have, however, been vested in organs outside the legislative and judicial branches because it has been felt that without such powers they could not effectively perform the manifold regulatory tasks entrusted to them by the legislature.

"If in private life we were to organize a unit for the operation of an industry, it would [hardly] follow Montesquieu's lines,"²⁷ nor can the regulation of industry demanded by modern public opinion be adequately carried out under a rigid separation of powers. The commissions have consequently been made the repositories of all three types of governmental power. In the administrative process, the various stages of making and applying law, traditionally separate, have been telescoped into a single agency. As Justice Jackson well put it in 1954, administrative agencies today "combine delegated rule-making, the investigation and

25. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, REPORT at 61 (1941).

26. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

27. LANDIS, *THE ADMINISTRATIVE PROCESS* 10 (1938).

prosecution of complaints, and adjudication, and are supposed to unite congressional judgment as to policy, executive efficiency in enforcement, and judicial neutrality and detachment of decision."²⁸ Legislative and judicial powers have become the chief weapons in the twentieth-century administrative armory.

Even at this late date there are those who deny that in a system such as ours, dominated by the doctrine of the separation of powers, any governmental organ outside the Congress or the courts can exercise legislative or judicial authority. Such constitutional purism is wholly out of line with the facts of contemporary governmental life. In the recent words of Justice Douglas:

There is no doubt that the agency which determines that a particular individual or company should be brought within the regulatory reach of the law is a lawmaking authority. It is, in other words, clear that the administrator who by order, by rule, or by regulation extends the civil or criminal sanctions of the law to named parties indulges in legislating.²⁹

The constitutional purist may claim that this sort of authority exercised by the administrator is, at most, only quasi-legislative in nature. Certainly, to soften a legal term by a "quasi" is a time-honored lawyer's device. Yet, in this case, it has become wholly illogical to grant the fact of the legislative power of the commissions and still to deny the name. When the Supreme Court in 1952 upholds an indictment of a trucker for violation of a regulation promulgated by the Interstate Commerce Commission prescribing certain compulsory safety precautions for trucks transporting inflammables or explosives,³⁰ perhaps the ICC regulation is only a quasi-law.³¹ But when the trucker is convicted of violating such regulations, we may be certain that they do not incarcerate him in a quasi-cell. To be sure, if we think of the separation of powers as carrying out the distinction between legislation and administration with mathematical precision and as dividing the branches of government into watertight compartments,³² we would probably have to conclude that any exercise of lawmaking authority by an administrative agency is automatically

28. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 44-45 (1955).

29. DOUGLAS, *WE THE JUDGES* 163 (1956).

30. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

31. According to *United States v. Howard*, 352 U.S. 212 (1957), such an administrative regulation is to be treated as a "law" under a statute making it unlawful to violate a "law of the State."

32. *Springer v. Philippine Islands*, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting).

invalid. In actuality, such a rigorous application of the constitutional doctrine is neither desirable nor feasible; the only absolute separation that has ever been possible was that in the theoretical writings of a Montesquieu, who looked across at foggy England from his sunny Gascon vineyards, and completely misconstrued what he saw.³³

The need for effective regulation has thus led to the merger in the one regulatory agency of what are essentially legislative, executive, and judicial functions. By concentrating these functions within the one commission, the legislator has felt there can then be performed the continuous policing function essential to effective regulation. Such concentration enables the one agency itself to administer all the different phases of a regulatory scheme—from the promulgation of the regulatory prescriptions, to the policing of the field of regulation to ensure that they are observed, to the prosecution of those who violate them, to the adjudication of cases brought against such violators.

In these cases, the agency concerned is both policeman, prosecutor, and judge. But here is the great paradox of the administrative agency—one that presents a well-nigh insoluble problem. The great weakness of the independent regulatory agency to a student of public administration is that it is a hybrid organism, set up to perform basically incompatible functions, whose very incompatibility makes it impossible for them to be performed properly. The agency is vested with the positive duty of implementing its enabling act, usually laid down in broad and general (or even "skeleton") terms, by the exercise of powers of rule-making and by administering its provisions. Especially significant in this respect is the affirmative duty imposed upon most of these bodies themselves to ensure that the terms of the enabling act are in fact complied with and to ferret out violators. These are basically executive functions, and the effectiveness with which they are exercised must, of necessity, have repercussions, often drastic, upon the policy and program of the President at the head of the executive branch of the Government.

The very independence of these agencies is such, however, as almost inevitably to hamper the effective execution of the President's policies and program in the fields committed to them. A new President may thus, for example, desire to relax or make more stringent the enforcement of the antitrust laws. But his policy in either direction may be thwarted if the majority of the Federal Trade Commission is committed to a contrary policy followed by the prior President. It is true, as the Task Force on Regulatory Commissions of the first Hoover Commis-

33. Compare 1 LÉVY-ULLMAN, *LE SYSTÈME JURIDIQUE DE L'ANGLETERRE* 376 (1928).

sion pointed out,³⁴ that the problem of co-ordination with the Executive varies among the different commissions. Still it cannot be denied that the problem does exist and that, in the case of some of these agencies (notably the FTC and the Federal Reserve Board), it can be a most serious one.

Why not then, one might ask, remove from these agencies their independent character and place them within the structure of the executive branch, subject to the complete hierarchical control of the President? Such a general solution is precluded by the fact that most of the federal agencies, in addition to their functions of implementing and administering their enabling legislation, which are essentially executive in nature, are vested with the duty of deciding cases in which alleged violators of the legislation are proceeded against. This latter duty is basically judicial in nature—that of trying defendants brought before the bar of justice (administrative rather than judicial justice, it is true, but that does not change the primarily judicial nature of the function). The exercise of a function of this type is one which under Anglo-American concepts is deemed to be best exercised in an atmosphere of independence rather than as part and parcel of the very process of execution of the laws exposed to all of the political pressures which play upon the political branches of government. Hence, the independence of these agencies from the Chief Executive was underlined by the Supreme Court in the famous case of *Humphrey's Executor v. United States*.³⁵ But the purpose of securing truly independent judicial determinations is subverted by the possession by the agencies of the executive functions referred to above. They cannot be expected to decide cases before them with that “cold neutrality of an impartial judge” of which Burke speaks when it is they who have instituted the proceedings against the private party and they who have the burden of presenting the case against him.

The key to the problem of the independent administrative agency is thus the merger in it of administrative and judicial duties—not only because such merger militates against proper exercise of the role of quasi-judge but, just as significant, because it prevents the administrative work of the agencies from being effectively co-ordinated into the policy and program of the executive branch as a whole. The problem resides in the combination of functions. Any attempt at solution which does not hinge upon an effort to mitigate the difficulties flowing from such concentration must prove illusory. This is the great weakness of the Administra-

34. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE ON REGULATORY COMMISSIONS at 26 (1949).

35. 295 U.S. 602 (1935).

tive Procedure Act sections dealing with the problem. They adopt the palliative of partial separation, which is inadequate to resolve the problem of proper exercise of judicial functions, and which does nothing about the equally important problem of effective exercise of administrative functions. An adequate solution of the problem must have two aims in view: (1) ensuring that the administrative functions of the agencies will be exercised in co-ordination with the policy and program of the Administration; and (2) ensuring that their judicial functions will be exercised in a truly judicial manner, uninfluenced by the possession of inconsistent functions of investigation and prosecution.

It is only the complete separation of administrative from judicial functions that can achieve these aims. Only by such separation can both the administrative and the judicial functions of these agencies be performed properly. Most lawyers have emphasized the need of separation for proper exercise of the role of quasi-judge. Just as important, however, is the fact that the concentration of functions impedes the effective execution of the administrative duties entrusted to the federal agencies.

V. HISTORICAL PERSPECTIVE

To speak of governmental institutions as endowed with life is more than a mere metaphor. The political body, like the animal, has its period of vigor and decline. Students of the administrative commissions have called attention to what they have called the "life cycle" of these agencies.³⁶ According to them, each of the federal commissions has experienced roughly similar periods of growth, maturity, and decline. From this point of view, the commissions today may be said to exhibit many of the symptoms of old age—if not senility. When a governmental agency becomes afflicted with administrative arteriosclerosis, the vital spark goes out of it, just as it would out of an afflicted individual.

The current crisis in the commissions arises from the fact that these agencies have for some years been disproving many of the basic assumptions which led to their creation. A more difficult matter, however, than that of analyzing the present inadequacies of our administrative agencies is that of proposing specific solutions for the resolution of our difficulties.

In this connection, there is an instructive historical parallel between the situation facing us today and that faced by sixteenth and seventeenth century Englishmen. It is well to remember that the problem of admin-

36. See, *e.g.*, BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* Chapter 3 (1955).

istrative justice is not an entirely new one in our law. Once before in Anglo-American history the legal system was faced with the problems posed by drastically changing economic conditions. In England at the end of the Middle Ages the social and economic fetters that had bound man for centuries were suddenly being unshackled. During this period of rapid transformation, the inadequacies of existing legal institutions were met by the creation of a host of executive tribunals to dispense justice that accorded with the felt needs of the time. The most important of these were the Star Chamber and Chancery.

The movement away from the common law in Tudor and Stuart times was a movement from judicial justice administered in law courts to justice administered in what were, to all intents and purposes, administrative tribunals.³⁷ And the ensuing struggle by the common law to re-establish its supremacy has interesting implications for our own day.

A lawyer, who regards the matter from an exclusively legal point of view, is tempted to assert that the real subject in dispute between statesmen such as Bacon and Wentworth on the one hand, and Coke or Eliot on the other, was whether a strong administration of the continental type should, or should not, be permanently established in England. Bacon and men like him no doubt underrated the risk that an increase in the power of the Crown should lead to the establishment of despotism. But advocates of the prerogative did not (it may be supposed) intend to sacrifice the liberties or invade the ordinary private rights of citizens; they were struck with the evils flowing from the conservative legalism of Coke, and with the necessity for enabling the Crown as head of the nation to cope with the selfishness of powerful individuals and classes. They wished, in short, to give the government the sort of rights conferred on a foreign executive by the principles of administrative law.³⁸

When the common lawyers eventually triumphed after the final expulsion of the Stuarts they did not, it should be noted, attempt to turn the legal clock back to pre-Tudor times. Instead, they sought to retain what was desirable in the administrative justice of their day and to fit it into its proper place in the legal order. The Star Chamber was abolished; but the law courts themselves realized that a large part of its work was of permanent value, and so much of its law passed into the common law.³⁹

37. See Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 19 (1914).

38. DICEY, *op. cit. supra* note 9, at 370.

39. See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 406 (2d ed. 1936).

And, insofar as Chancery was concerned, its place in the legal system was definitely confirmed. "The danger of Equity turning into the servant of despotism had passed away, and English statesmen, many of them lawyers, were little likely to destroy a body of law which, if in one sense an anomaly, was productive of beneficial reforms."⁴⁰

Chancery was retained as a separate tribunal, but it was wholly judicialized along common-law lines. Thus the Lord Chancellor, who, as Chief Justice Vanderbilt has pointed out, "was originally, as his name implies, the chief clerk of the king and dealt out administrative justice in the king's name,"⁴¹ became, in time, the head of a true court, with its established place in the existing legal order. Thus, "although Coke lost in his quarrel with the Court of Chancery . . . Chancery was made over gradually along common law lines. The equity made in the Court of Chancery and the law as to misdemeanors made in the Star Chamber became parts of our legal system; it is not too much to say they became parts of the common law."⁴²

The significance of the historical development just described for our own day and age was well put by Chief Justice Vanderbilt over fifteen years ago:

Maitland, in his Rede lecture, has shown how the common lawyers of the sixteenth century met the challenge of another body of administrative law, in Chancery, in the Star Chamber and in the Privy-Council—and to the great advantage of the common law. Then, as now, the administration of the common law left much to be desired. Then, as now, what was needed was more administration in the courts of justice and more of the fundamental principles of justice in the administrative tribunals. The common lawyers of the sixteenth century met their problems and mastered them. The challenge of today is so clear that it does not need to be stated. The only question is can we meet it?⁴³

The challenge of administrative justice in the sixteenth and seventeenth centuries was met in our law by the elimination of the undesirable elements in such justice and the retention and judicialization of the rest. The arbitrary discretion exercised by the tribunals dispensing such jus-

40. DICEY, *op. cit. supra* note 9, at 381.

41. *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 2 N.J. 356, 366, 66 A.2d 726, 731 (1949).

42. Pound, *supra* note 37, at 21.

43. Vanderbilt, *The Place of the Administrative Tribunal in Our Legal System*, 24 A.B.A.J. 267, 273 (1938).

tice was canalized within legal limits, and where such discretion was, as in the case of Star Chamber, too intimate a part of the tribunal, the tribunal itself was done away with. The common lawyers who had earlier complained that the justice administered by Chancery was so uncontrolled by legal principles that it might just as well have depended upon the size of the particular Chancellor's foot were able to ensure that Chancery became a true court for the application of principles which, though different from those of the common law, were no less fixed.

The ideal development of our administrative law would be for it to follow the pattern of the executive tribunals of three centuries ago. The justice dispensed by the great federal agencies must become truly judicialized and administered by bodies possessing solely judicial authority. Such bodies will, in time, follow the example of Chancery and develop into courts. Our administrative law will then become as much a part of our ordinary law as did our law of equity after Lord Nottingham.

The starting point for this development in our law could be the giving of effect to the proposal made in 1937 by the President's Committee on Administrative Management for the complete segregation of administrative from judicial functions in the independent federal agencies. The Committee's proposal was that agencies with judicial functions should be divided into an administrative section and a judicial section. The administrative section would be designed "to formulate rules, initiate action, investigate complaints . . . [to] do all the purely administrative or sub-legislative work now done by the commissions—in short, all the work which is not essentially judicial in nature." The judicial section would "sit as an impartial independent body to make decisions affecting the public interest and private rights."⁴⁴

The Committee's proposal involves, in effect, the abolition of the independent administrative agencies as we have known them. Both the administrative and judicial sections into which those agencies would be divided would be set up within the appropriate executive department. The administrative section would be organized as a regular bureau or division. The judicial section would, on the contrary, be in the department only for "housekeeping purposes" and would, in fact, be wholly independent.

There seems to be little doubt that if this proposal were followed the judicial sections contemplated by it would and should eventually develop into courts. Such has been the common historical development of tribunals endowed only with judicial authority, though they may have

44. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT at 41-42 (1937).

started as purely executive agencies. This is what happened, as we have seen, with Chancery. But equity in England has not been unique in this respect. Its development duplicated the experience of the Roman law many centuries earlier, and more recently a similar development has occurred in the judicialization of the *Conseil d'Etat* in the French legal system.⁴⁵ In our system today there is the suggestive experience of the Tax Court which began some years ago as the Board of Tax Appeals—an executive tribunal—which has undergone the process of judicialization in our own lifetime.

For our administrative law to duplicate the experience of the common law of the sixteenth and seventeenth centuries, it would thus have to go through two stages: (1) the separation of judicial and administrative functions in the federal agencies and the placing of the former in an appropriate number of independent tribunals; and (2) the judicialization of these tribunals into true courts.

It will immediately be objected that the development suggested will result in anything but a symmetrical judicial system. The multiplication of courts envisaged cannot help but confuse the judicial structure. It should not necessarily be assumed, however, that the evolution of the separate administrative courts will be the ultimate stage. On the contrary, it is entirely probable that those courts themselves will eventually coalesce into a single court. "Legal history," as Dean Pound has put it, "shows the general course of development to be a setting up of a multitude of specialized tribunals, and then a gradual consolidation of them into a simple unified system."⁴⁶ The ultimate stage could thus be the establishment of an administrative court which would exercise the judicial functions now vested in the federal regulatory agencies.⁴⁷

VI. CONCLUSION

Such a drastic proposal has, not unnaturally, met with strong criticism from proponents of the present system. The objections, however, lose sight of the extreme nature of the crisis that has occurred in the federal agencies in recent years. Those who propose palliatives for the present administrative system may, in fact, do more harm than good in the long run. If their measures are adopted, they will give the illusion

45. See SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 1-18 (1954).

46. *Report of the Special Committee on Administrative Law*, 63 A.B.A. REP. 331, 355 (1938).

47. The Second Hoover Commission Task Force on Legal Services and Procedure recommends the setting up of such Administrative Court at the present time. REPORT at 249-50 (1955).

of safeguards which are really facades. Commissions composed of men who are insulated by neither the tenure nor the traditions of the judiciary cannot really be expected to act with true independence in the public interest. To retain the essentials of the present system and still remedy its inherent defects is as chimeric a task as the squaring of the circle.

If, in Madison's famous phrase, men were angels, perhaps we would not have to concern ourselves with the proper functioning of political institutions. Yet, even of this we cannot be certain, for does not Bacon tell us that it was the desire of power that caused even the angels to fall? In a government of men over men, the only safe assumption is constant scrutiny to ensure that public bodies are in fact fulfilling the purposes for which they were instituted. We need not necessarily agree with Lord Acton that great men are almost always bad men, but our governmental structure and system of checks and balances must clearly be based upon some such assumption. In fact, our whole constitutional structure has been erected upon the assumption that the king not only is capable of doing wrong, but is more likely to do wrong than other men if given the chance. We must not today depart from the judgment of our ancestors and judge those in possession of governmental power with the presumption that they can do no wrong. On the contrary, if there is any presumption, it should be the other way—against the holders of power and increasing as the power increases. In the field of administrative law, historic responsibility can never make up for the want of legal responsibility and safeguards.